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KNOW?**

Healthcare Risk Management Advisory

FOR LEXINGTON INSURANCE POLICYHOLDERS

Permissible Texting in Healthcare

When determining whether and when texts may be sent in healthcare, many questions exist. For example:

- When can texts be sent;
- Do we need the patient's permission to text them?
- Are texts treated the same as voice mails?
- What information can we include in texts?

By way of background, text messaging (Texting) or SMS (Short Message Service) transmits text messages between two or more mobile phones, tablets, desktops/laptops, or other devices. In addition to letters and numbers, text messages now have the capability to also include digital images, videos and sound.

The Federal Telephone Consumer Protection Act (TCPA), Centers for Medicare and Medicaid Services (CMS) and The Joint Commission (TJC) each provide their own parameters for permissible uses of texting in various healthcare settings. Specifically, the TCPA, enacted in 1991 initially protected consumers from unsolicited communications from automated telephone calls, facsimile machines and automatic dialers. Today, the TCPA also applies to cell phone and text messaging communications as well. Thus, under the TCPA, an organization must obtain prior express consent in order to call, fax or text an individual.

With respect to healthcare, in 2015, the Federal Communications Commission (FCC) created several narrow exceptions to the TCPA's consent requirement. Specifically, the FCC's enumerated exceptions allowed healthcare providers to send prerecorded voice messages related to an "urgent" healthcare treatment purpose (as defined under HIPAA) to land lines, without receiving prior consent. The FCC subsequently expanded these exceptions to include messages sent to wireless devices/cellphones.

The TCPA's healthcare exceptions apply to healthcare messages related to:

- Appointments and exams
- Lab results
- Confirmations and reminders
- Post-discharge follow-up intended to prevent readmission
- Wellness checkups
- Prescription notifications
- Hospital pre-registration instructions
- Home healthcare instructions
- Pre-operative instructions

The exceptions do not apply to calls concerning:

- Telemarketing
- Advertising content
- Solicitation
- Accounting, billing, debt collection, or other financial content

Additionally, the FCC placed several conditions on these excepted communications, including:

- Patients may not incur charges for the message, i.e., messages cannot count toward the patient's text/minute allowances, or other plan limits
- Message may only be sent to wireless telephone numbers provided by the patient
- Messages must state the name and contact information of the healthcare provider (for voice calls, these disclosures would need to be made at the beginning of the call)
- Messages cannot include information related to telemarketing, solicitation, or advertising, and cannot include accounting, billing, debt-collection, or other financial information
- Messages must comply with HIPAA privacy rules
- Text messages may not exceed 160 characters
- Only one message (either voice call or text message) may be left per day, and no more than three voice calls/text messages may be left per week
- Each message (voice and text) must provide an easy means to opt out of future messages
- Text messages must inform patients that they can choose to opt out by replying "STOP," which is the sole means by which patients may opt out of such messages
- A healthcare provider must honor the opt-out requests immediately

Keep in mind that TCPA violations result in strict liability, meaning that the caller/sender is liable even if not at fault. Further, violations of the TCPA carry damages of up to \$500/call or message and up to \$1500 if the violation was knowing or willful. There is no maximum cap on damages, which can result in significant exposure in class action litigation.

Recently, the United States Second Circuit Court of Appeals reaffirmed the TCPA's "healthcare messages" exception in *Zani v. Rite Aid Hdqtrs. Corp.*, 17-1230-cv (Feb. 21, 2018). Specifically, the *Zani* Court held that Rite Aid's flu shot reminder calls fell within the TCPA "healthcare message" exception and did not require express consent, even though it contained a marketing component. Thus, Rite Aid was not liable for the \$500-\$1500/call statutory damages. The Second Circuit warned though, that marketing calls purporting to be "healthcare" messages may not always fall within TCPA's exceptions, depending on the specific circumstances.

Given the potential for significant exposure, healthcare organizations should proactively analyze how, when and who conducts voice/text communications with patients. The analysis should include examining:

- Processes for obtaining consent
- Current records of patient consent
- Methods/vendors used to contact patients
- Policies and procedures regarding how phone numbers are collected, and calls/texts are logged
- Training regarding permissible content

Conversely, while the TCPA permits texting for some healthcare related activities, both TJC and CMS prohibit texting of patient care orders. By way of background, TJC stated in 2011 that it was not acceptable for physicians

or other licensed independent practitioners to text orders for patient care, treatment or services to hospitals or other healthcare settings. In May 2016, TJC announced that it was now permissible to text patient care orders as long as specific security requirements were in place.

Subsequently, however, TJC in conjunction with CMS, rescinded this approval due to remaining concerns about transmitting text orders even when using a secure text messaging system. Specifically, they expressed concern that permitting the texting of patient orders might result in an increased burden on nurses having to enter text orders into the EHR. An additional concern was that texting patient orders does not allow for the real-time confirmation of the order, among other safety concerns.

In 2017, CMS further clarified its position regarding permitted text messaging of patient information by providers, stating¹:

- Texting patient information among members of the healthcare team is permissible if accomplished through a secure platform
- Texting of patient orders is prohibited regardless of the platform utilized
- Computerized Provider Order Entry (CPOE) is the preferred method of order entry by a provider

Conclusion:

While TJC and CMS continue to prohibit the texting of patient care orders. The TCPA permits texting patient information under certain conditions. Contact Lexington Healthcare Risk Management (riskmanagement@aig.com) with any questions you may have about communicating with patients via texting.

¹CMS, Center for Clinical Standards and Quality/Survey & Certification Group, "Texting of Patient Information among Healthcare Providers" (12/28/2017)

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